United States

..., JR.,
... State of Florida, and

... AUSTIN, JR.,
... Charlotte County, Florida,
... Grand Jury,

Petitioners,

vs.

... SMITH,

Respondent.

... CERTIORARI
... COURT OF APPEALS
... CIRCUIT

... BRIEF

QUESTION PRESENTED

WHETHER FLORIDA MAY CONSTITUTIONALLY IMPOSE CRIMINAL PENALTIES ON GRAND JURY WITNESSES WHO WISH TO REVEAL THE CONTENT, GIST, OR IMPORT OF THEIR GRAND JURY TESTIMONY EVEN LONG AFTER THE GRAND JURY HAS COMPLETED ITS WORK.

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STATEMENT OF THE CASE

Smith accepts and adopts the statement of the case and facts as set forth by the State of Florida with the following additions.[1] Both during and after Smith's appearance before the special grand jury, members of the special prosecution's staff confronted Smith and warned him that any disclosure of his testimony would constitute a criminal violation (R. 1, p. 3).[2] Smith fears that he will be prosecuted under Florida Statutes, Section 905.27 (1987) if he discusses any of the matters that led to the investigation or his experiences in front of the grand jury. Persons convicted under Section 905.27 face a jail sentence of up to one year and a fine of up to $5,000.

Chief Assistant State Attorney Chris Hoyer testified that, in his experiences as a federal prosecutor, he never had an occasion in which a witness's lack of secrecy caused a problem (R. 14, 16-17).

SUMMARY OF THE ARGUMENT

This Court has long applied very strict standards of review to statutes like Section 905.27 which restrain the publication of truthful speech. No matter whether Florida's attempt to silence grand jury witnesses is analyzed

[1] In this response, Petitioners Robert A. Butterworth, Jr. and T. Edward Austin, Jr., will be referred to as "the State." The record below is referred to as "R.", Petitioners' appendix is referred to as "A.", and "Br." refers to the State's brief in support of its petition.

[2] The facts alleged in Smith's verified complaint have never been contested by the State.

as a prior restraint or a penal sanction, the State must prove an interest of the highest order for the statute to survive constitutional scrutiny.

The impact of the statute on Smith's First Amendment rights cannot be minimized. Section 905.27's astonishingly broad scope forces witnesses to remain silent about any subject that could remotely be related to their grand jury testimony. Because of the fear of prosecution, witnesses like Smith must refrain from discussing even information gained prior to and independent of the grand jury if their speech relates to the content, gist, or import of what took place in the grand jury room.

As the Eleventh Circuit recognized, the State has not demonstrated a compelling need for this broad rule of permanent witness secrecy. Contrary to the State's assertions, there is no long tradition of grand jury witness secrecy. Florida is one of a minority of jurisdictions imposing secrecy upon its witnesses. In the federal system, Rule 6(e), Federal Rules of Criminal Procedure forbids imposing any secrecy obligation on a witness. Numerous states have similar statutes; indeed, thirty-seven (37) states have imposed no obligation of grand jury secrecy on witnesses. The proven fact that these jurisdictions have long been able to operate successfully without the need for grand jury secrecy contrasts sharply with the speculative justifications forwarded by the State in this case.

One need not even look outside of Florida to determine that grand jury secrecy is unnecessary. Less than one percent of prosecutions in Florida are initiated by

indictment. As to the ninety-nine percent of the prosecutions begun by information, secrecy is not only unnecessary, it is forbidden by Florida's Public Records Act. The State has not demonstrated why the need for secrecy is any greater in investigations leading to indictments.

Even if the State could demonstrate to this Court that there were compelling justifications for witness secrecy, it has not demonstrated why the less restrictive alternative chosen by the Eleventh Circuit is inadequate to protect its interest. Consistent with a long line of precedent, the Eleventh Circuit held that there is no longer any justification for grand jury secrecy once the grand jury has completed its work. Thus, any valid interest proposed by the State could be satisfied merely by imposing secrecy until the close of the grand jury session. The total and permanent restraint imposed by Section 905.27 is unconstitutional.

ARGUMENT

The State presents its argument as a routine effort to preserve what it calls a "tradition" of grand jury secrecy. Perhaps the State would be right if Smith sought the right to attend the grand jury's proceedings and deliberations, or demanded access to grand jury transcripts. As the Eleventh Circuit recognized in its decision below, Smith makes no such attempt. This case concerns Smith's constitutional right to recount his own experiences and to express his own opinions concerning the grand jury proceeding and the subject of its investigations. On pain of

imprisonment, the State has ordered Smith to remain forever silent.

The broad reach of Section 905.27 is truly remarkable. Not only does the statute prevent Smith from revealing what he told the grand jury; the statute prevents Smith from recounting the results of his own independent investigation prior to the grand jury because it prohibits him from revealing even the content, gist, or import of his testimony. Fla. Stat. § 905.27(2) (1987). One day prior to his testimony, Smith, a newspaper reporter, had the constitutional right to report concerning the fruits of his own independent investigation, including anything he knew about the grand jury's investigation and the facts underlying that investigation. The day after, Smith's speech was forever suppressed by the threat of prosecution and imprisonment.

By focusing solely on grand jury secrecy, the State treats this case as if Smith were reaching out to pry open a secret proceeding. This approach completely skews reality. The State, through compulsory process, has reached out to Smith to silence him. While writing a series of newspaper articles, Smith obtained information relevant to alleged improprieties committed by the Charlotte County State Attorney's Office and Sheriff's Department (Br. 4). Through the power of government, he was commanded to appear before an investigative body that had the right to demand from him everything he knew. On pain of contempt, he answered those questions. Upon release, he was warned never to reveal anything about what had happened to him.

The restraint imposed by Section 905.27 has a totalitarian air about it that is inescapable. To take the example one step further, suppose that Smith's interrogators had been the sheriff's department or the state attorney's office and, after a night of interrogation at the jailhouse, they warned Smith that he would be imprisoned if he ever revealed to anyone what had gone on in the interrogation room. Every court in this country, without a second thought, would strike such a practice as an outrageous violation of Smith's First Amendment rights. Yet, the only distinction between this example and the case before this Court is that the interrogating body is a grand jury instead of the sheriff. The interests that would be asserted by the sheriff or the police department in favor of investigative secrecy would be identical to those argued so forcefully by the State in this case. Without a doubt, those interests would be considered subservient to Smith's First Amendment rights as a reporter and a citizen.

Thus, this Court must ask: What is it about a grand jury investigation that would permit the State to turn what would otherwise be an outrageous prior restraint into a necessary investigative tool? This brief shows that there is no such justification. The brief addresses the State's attempt to minimize Smith's claim of injury by proving that Smith's speech lies at the core of the First Amendment. It disputes the State's claims that there is a long tradition of grand jury secrecy by proving that the majority of the states and the federal government have no such tradition of witness secrecy. It analyzes the State's claims of investigative interference and proves that the State's concerns are speculative and can be satisfied by

less restrictive alternatives. Finally, this brief shows how the reputational interests of the "innocent accused" are hindered rather than furthered by Section 905.27 and come at the expense of the witness's reputation.

The Eleventh Circuit was correct to hold the State's purported justifications insufficient to support the permanent restraint on speech imposed by Section 905.27. That judgment should be affirmed.

I. THE STATE CANNOT PUNISH SMITH'S SPEECH WITHOUT PROVING A STATE INTEREST OF THE HIGHEST ORDER.

A. The Framework of Analysis

In nearly 200 years of jurisprudence, this Court has never upheld a prior restraint on truthful speech.[3] Section 905.27 operates as just such a restraint because it imposes penal sanctions for publishing lawfully obtained, truthful information. According to this Court, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). Statutes imposing criminal penalties for truthful speech are viewed with the same suspicion and evaluated by the same standards as statutes imposing prior restraints, the most serious and least tolerable restraints on speech. *Id.* at 101-102. Thus,

[3] In re Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986) (collecting cases).

Section 905.27 comes to this Court with a presumption of unconstitutionality.[4]

Smith v. *Daily Mail* provides an excellent example of this Court's hostility to statutes like Section 905.27. West Virginia made it a crime to publish the name of a youth charged as a juvenile offender. The reporter, after learning the name of the offender through public sources, published the juvenile's name. This Court rejected West Virginia's attempt to punish the reporter criminally, equating the imposition of criminal penalties with a prior restraint:

> Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity.

Id. at 102. The state's interest in protecting the anonymity of juvenile offenders was not considered of sufficient magnitude to justify the restraint on speech. *See also Worrell Newspapers of Indiana, Inc.* v. *Westhafer*, 739 F.2d 1219, 1222 (7th Cir. 1984), *aff'd*, 469 U.S. 1200 (1985) (state could not punish reporter for publishing information in sealed indictment).

The State bears a "heavy burden" to justify criminal penalties for truthful speech. *See New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971). That burden has never been carried successfully in this Court. This Court

[4] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 181 (1968).

has rejected a wide range of interests as insufficiently compelling to justify restraints on speech.[5]

Nor is this the first case in which this Court has been required to weigh the interests of investigative secrecy against the right to speak. For example, in *Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978) this Court strictly scrutinized a statute precluding disclosure of information about activities of the Virginia judicial review commission. A newspaper publisher was convicted under a Virginia statute that prohibited "any person" from divulging information concerning commission proceedings and subjected those who violated the statute to criminal prosecution. The state justified the statute as necessary to ensure full disclosure by witnesses and to

[5] Florida Star v. B.J.F., 491 U.S. ___, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (state's interest in protecting the anonymity of victims of sexual offense); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (state's interest in raising revenue); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (state's interest in preserving the anonymity of its juvenile offenders); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (state's interest in preserving the integrity of its judiciary); Oklahoma Publishing Co. v. District Court of Oklahoma, 430 U.S. 308 (1977) (state's interest in preserving the anonymity of its juvenile offenders); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (state's interest in protecting a criminal defendant's Sixth Amendment right to a fair trial); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (state's interest in preserving the anonymity of victims of sexual assaults and the right of privacy); New York Times Co. v. United States, 403 U.S. 713 (1971) (national security); Craig v. Harney, 331 U.S. 367 (1947) (state's interest in protecting the integrity of the judiciary); Near v. Minnesota, 283 U.S. 697 (1931) (state's interest in preserving the integrity of public office).

protect the reputation of judges unjustly accused of misconduct – precisely the interests asserted by the State here.

Despite the state's concerns over possible interference with the commission's investigations, this Court analyzed the Virginia statute under the same standards later utilized by *Smith v. Daily Mail*. After balancing the state's interest in confidentiality against the publisher's First Amendment rights, this Court held that punishing the newspaper for publishing truthful information violated the First Amendment. Moreover, this Court held that Virginia sought to punish speech that lay "near the core of the First Amendment." *Landmark Communications*, 435 U.S. at 838. Although the state's interests were legitimate, they were "insufficient to justify the actual or potential encroachment on freedom of speech and of the press." *Id.* Smith's interests in free speech are no less important.

In *Wood v. Georgia*, 370 U.S. 375 (1962), this Court considered the conduct of a state sheriff whose speech allegedly interfered with a grand jury investigation. This Court scrutinized the contempt conviction with the same scrutiny given to attempts to impose prior restraints. The contempt conviction had to be reversed unless the state could show that the substantive evil was extremely serious and the degree of imminence was extremely high. *Id.* at 384-85. The state could not satisfy its heavy burden. Quite to the contrary, this Court found that the sheriff's right to speak made an important contribution to our structure of self-government:

> When the grand jury is performing its investigatory function into a general problem area, without specific regard to indicting a particular individual, society's interest is best served by a thorough and extensive investigation, and a greater degree of disinterestedness and impartiality is assured by allowing free expression of contrary opinion.

Id. at 392. The sheriff's right to comment on the grand jury was not insidious; it was invaluable.[6]

These cases are instructive because in each, this Court was forced to balance free speech and press rights against the need for institutional secrecy or the threat of interference with an investigative or judicial proceeding. As such, *Landmark Communications, Smith,* and *Wood* provide the framework for analyzing the blanket restraint imposed by Section 905.27. Each case confirms that the restraint on speech is presumed unconstitutional, regardless whether it is considered a classic prior restraint or a penal sanction, and can be justified only in exceptional circumstances. No compelling justifications exist in this case.

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[6] Similarly, in Craig v. Harney, 331 U.S. 367 (1947), this Court reversed a contempt conviction resulting from the publication of an article highly critical of a lay judge. The judge defended the contempt order by arguing that punishment was necessary to prevent any interference with judicial proceedings. This Court applied the same strict standard of scrutiny, rejecting the claim that there was a "serious and imminent threat" to the administration of justice. *Id.* at 372-376. *See also* CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (gag order imposed on those connected with Kent State case struck down as unconstitutional).

B. Section 905.27 Significantly Impacts Smith's Free Speech Rights.

Florida's witness secrecy statute could not be broader in scope. According to Section 905.27(2):

> It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, . . . in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof. . . .

This ban is permanent. Once the witness testifies, the witness may never discuss the content, gist, or import of his testimony. The grand jury may be long terminated, the target may be long imprisoned or dead, and the restraint continues. No party need show that the restraint is necessary to accomplish any legitimate state interest. The restraint is imposed in all cases regardless of the impact on the witness, and regardless of the need, if any, for secrecy.

The egregious impact of this statute is dramatically illustrated by this case. As a reporter, Smith conducted an investigation into alleged improprieties committed by the state attorney and the sheriff. Before he was subpoenaed, he could criticize the state attorney, the sheriff, and the grand jury, report on the fruits of his independent investigation, or report on the facts underlying the investigation. The day after his testimony, the subject of the investigation was off limits to him. On pain of imprisonment, he was forbidden from commenting on his investigation, the grand jury and its investigation, or the facts underlying its investigation. To speak about any subject remotely relating to his testimony would raise the issue

of whether he revealed the content, gist, or import of his testimony.

The State tries to minimize the restraint by arguing that Smith is free to report on the fruits of his own inquiries (Br. 20). However, the State's brief confirms that Smith's freedom to publish is much more limited. Smith, according to the State, is not just restrained from revealing his testimony; he is forbidden from revealing the "content, gist, or import" of anything he may have learned during his grand jury appearance (Br. 11). Moreover, Smith is forbidden by the State's interpretation of the statute from publishing his observations of the grand jury or even speculations about its investigations (Br. 13).

As the State's argument rightly implies, "content," "gist," and "import" are words susceptible to extremely broad interpretation. "Content" or "gist" make clear the State's attempt to include all information remotely relevant to that which is revealed to the grand jury. As even the State's witnesses admitted, any comment made by Smith concerning the subject matter of the investigation could be interpreted as divulging the "gist" of his testimony even if his comments are based on sources outside of the grand jury (R. 18, pp 31-32). Thus, so long as Smith's speech concerns the same subject matter as his testimony in front of the grand jury, the state attorney has instant grounds for prosecution.[7] Smith will have the

[7] This is not to imply that the state attorney would necessarily be bringing the action in bad faith, but the state attorney has no way of determining whether Smith is speaking only about the subjects he learned about during the grand jury investigation or is revealing information that he knew prior to his appearance before the grand jury.

burden of proving that his speech was entirely based upon information obtained from independent sources.

The use of the word "import" imposes an even more odious restraint. To forbid Smith from discussing the "import" of his experience is to foreclose any meaningful editorial comment by Smith on the investigation or the facts underlying the investigation. Even if based entirely upon information gained outside the grand jury room, how can Smith describe the relevance of the information in his possession or its significance without becoming immediately susceptible to the claim that he is revealing the import of what occurred in the grand jury room?

This broad restriction on editorial comment is precisely what the State hopes to achieve. At one point, the State makes the transparently unconstitutional argument that, if Smith is permitted to comment, he might "sensationalize or otherwise distort" what has actually taken place (Br. 13). The most fundamental principle of First Amendment law is that we depend on the marketplace of ideas rather than the State to separate the truth from fiction. Sensationalized reporting, even vicious, inaccurate and grossly distorted reporting, does not justify a prior restraint. *Near v. Minnesota*, 283 U.S. 697 (1931).

The threat of prosecution arising from the broad language of the statute is enough to chill Smith's speech. As this Court held in a similar context, "people do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them . . . " *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963). *See Florida Star v. B.J.F.*, 491 U.S. ___, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (recognizing the danger of self-censorship that

results from vaguely defined civil or criminal standards of liability).

It is no small task for Smith to be able to distinguish between speech that is legal and speech that violates Section 905.27. Grand jury witnesses sometimes spend a day or more in front of the grand jury answering hundreds of questions on various subjects. If they are to comply with Section 905.27, once they leave the grand jury room, they must be able to confidently recall their testimony from memory *for the rest of their lives* without the benefit of notes or transcripts. Freedom of speech should not depend on such a Herculean effort. *See, e.g., NAACP v. Button*, 371 U.S. 415, 418-19 (1963).

Section 905.27 also has an impact on Smith in his capacity as a news reporter as well as in his individual capacity. The statute prevents him from disseminating information of great public interest to others who may wish to be informed about the public officials under investigation. By restricting Smith's speech, the statute restricts the public's right to hear what Smith has to say regarding the controversy in which he was personally involved. As one court put it in addressing another restraint on speech arising in the grand jury context, "the order prevents not only [the speaker] from speaking, but the rest of the world from hearing." *King v. Jones*, 319 F.Supp. 653, 660 (N.D. Ohio 1970), *vacated on other grounds*, 450 F.2d 478 (6th Cir. 1971), *vacated on other grounds*, 405 U.S. 911 (1972). *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (recognizing the important role of the press in bringing information to the public).

This case is the perfect example of a restraint where the "risks of freewheeling censorship are formidable" because the "line between legitimate and illegitimate speech" is so "finely drawn." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). Any statutory system with a potential impact on legitimate speech must use "sensitive tools to assure that protected speech is not illegally restricted." *Id.* at 561. A restraint, such as that imposed by Section 905.27, making it impossible to distinguish between legal and illegal speech cannot stand. *Id.; NAACP v. Button*, 371 U.S. at 418-19.

C. *Seattle Times Co. v. Rhinehart* Does Not Apply.

Perhaps belatedly coming to the realization that Section 905.27 will not survive the rigorous scrutiny applied to statutes restraining speech, the State asks this Court to apply the much more deferential standard of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).[8] The facts in *Seattle Times* are diametrically opposed to Smith's claim here. The *Seattle Times* was sued in a libel action by a religious group and its leader. The *Seattle Times* responded with discovery requests seeking membership lists and financial information, including the sources of donations to the religious organization. The religious group sought to

[8] This conversion to *Seattle Times* is of recent vintage. The State did not argue the *Seattle Times* standard in either court below. Its first appearance is in the State's brief on the merits in this Court. The State's earlier omission of *Seattle Times* was wise; *Seattle Times* does not apply to this case.

block discovery, arguing that the disclosure of the information sought would violate their freedoms of association and religion. The group agreed to disclose the information only pursuant to a protective order preventing the material from being disseminated to the public. The newspaper then argued that it had a First Amendment right to disseminate the information that it had obtained solely through the use of compulsory process.

This Court held that the limits placed on dissemination by the protective order did not violate the newspaper's First Amendment rights. According to this Court's limited holding:

> We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information gained from other sources, it does not offend the First Amendment.

Id. at 37.

In *Seattle Times*, the newspaper used discovery, a process granted by legislative grace, to extricate information from a religious group that would otherwise have been protected from disclosure, not only by principles of confidentiality, but also by First Amendment principles protecting freedom of religion and association.[9] Absent the right to utilize the discovery rules, the newspaper would never have obtained the information from the group that it sought to publish. The restraint did nothing

[9] *See* NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463-65 (1958).

more than prohibit the newspaper from publishing information that it gained through its decision to use compulsory process.

Smith's case must be analyzed from precisely the opposite perspective. It is the State and not Smith that has used compulsory process to obtain information. Yet it is Smith, not the State, who is ordered to remain forever silent by statute. Utilizing the facts of *Seattle Times*, it is as if the newspaper had the power to compel discovery from the religious organization and then forever bar the organization from speaking about even the "content, gist, or import" of the matters requested by the newspaper in discovery. To restrict access to information obtained by legislative grace is one thing; to impose involuntarily restraints upon the speech of the party giving up the information is quite another.

That distinction is magnified when, as here, it is the State that demands secrecy as a consequence of its own resort to compulsion. State power to silence its citizens at will, no matter how broad or narrow the restriction, can only be justified by the most compelling of reasons. *See Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (use of compulsory process must be "carefully circumscribed" where it impinges on the "highly sensitive" area of freedom of speech).

This case also differs markedly from *Seattle Times* in the scope of the information being suppressed. This Court was careful to note that the restriction in *Seattle Times* concerned only information obtained through discovery and did not apply to information gained from other sources. 467 U.S. at 37. By contrast, Section 905.27

means that Smith is no longer free, without fear of prosecution, to report concerning the fruits of his investigation of the sheriff and the state attorney, even though all of his information was gathered prior to and independent of his grand jury testimony.

Attempts by other litigants to use *Seattle Times* to justify restraints on speech outside of the narrow context of the discovery process have been unsuccessful. For example, in *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 469 U.S. 1200 (1985), this Court summarily affirmed the decision of the Seventh Circuit holding unconstitutional an Indiana statute that punished anyone who divulged the name of an individual named by a sealed indictment. *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219 (7th Cir. 1984). The Seventh Circuit had concluded that Indiana sought to punish speech "near the core of the First Amendment." *Id.* at 1224. The court noted the important distinction between secrecy imposed on those such as court officials who receive information by reason of their positions and witnesses who are compelled to testify. *Id.* at 1223. In a parallel case, the Third Circuit considered whether witnesses before a judicial review board could be prevented from revealing their testimony. In *First Amendment Coalition v. Judicial Inquiry & Review Board*, 784 F.2d 467 (3d Cir. 1986), the court rejected *Seattle Times* as the applicable standard, noting the distinction between those who utilize compulsory process and those who involuntarily are summoned to appear. *Id.* at 478.[10]

[10] *See also* In re Perry, 859 F.2d 1043, 1047 (1st Cir. 1988) (*Seattle Times* cannot be used to silence public comments

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The State has not cited a single case extending *Seattle Times* beyond its limited facts. Nor could it, all of the cases concerning restraints on witnesses' speech, decided both before and after *Seattle Times*, have confirmed that these cases must be analyzed under the strict standards of review imposed by this Court in cases like *Landmark Communications*, *Smith*, and *Craig*.[11]

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pertaining to pending litigation); The Courier-Journal v. Marshall, 828 F.2d 361, 364 (6th Cir. 1987) (court distinguishes between information gained through discovery and information obtained from other sources); United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) (First Amendment standards apply to release of bill of particulars rejecting applicability of *Seattle Times* standard). In *First Amendment Coalition*, the Third Circuit held that witnesses could not be prevented from revealing their own testimony on First Amendment grounds, but approved a more limited restriction on the witness's speech. Witnesses could be prevented from commenting on the testimony of other witnesses or comments of the commissioners which they overheard. *First Amendment Coalition*, 784 F.2d at 478-79. The court did not articulate the compelling justification that distinguished the more limited restraint from that declared unconstitutional.

[11] In a series of cases the courts have rejected attempts to impose witness secrecy despite Federal Rule of Criminal Procedure 6(e) which specifically excludes witnesses from the requirements of grand jury secrecy. *See* 27-29 *infra*. These cases recognize the magnitude of the restraint and its effect on the witness's ability to speak. In re Grand Jury Proceedings, 814 F.2d 61 (1st Cir. 1987) (compelling reason needed to justify restraint of witness served with grand jury subpoena); In re Grand Jury Subpoena Duces Tecum, 797 F.2d 676, 681 (8th Cir.), *cert. dism'd sub. nom.*, Merchants National Bank v. United

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D. The Particularized Need Standard Does Not Apply.

Hedging its bets on the *Seattle Times* standard, the State's fallback position is that Smith must show a particularized need before he has the right to speak about the subject of his own grand jury testimony. The State builds its arguments on cases where a defendant sought access to the testimony of other grand jury witnesses. *See Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958). Such cases have no application here because Smith does not seek access to any portion of the grand jury proceeding. He has not even asked for access to his own testimony. He asks only for the right to speak concerning the fruits of his independent investigation and the subjects of his grand jury testimony now that the grand jury session has long terminated.

On numerous occasions this Court has recognized the distinction between restricting access to information (such as access to grand jury transcripts) and restricting the publication of information already held (such as

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States, 479 U.S. 1013 (1986) ("to impose an order of secrecy upon a grand jury witness, there must be a 'compelling necessity . . . shown with particularity.'"). *See also* In re Grand Jury, 558 F.Supp. 532 (W.D. Va. 1983) (holding that a similar witness restraint was a disfavored prior restraint); In re Grand Jury Subpoena of East National Bank of Denver, 517 F.Supp. 1061 (D. Colo. 1981); In re Vescovo Special Grand Jury, 473 F.Supp. 1335 (C.D. Ca. 1979); United States v. Kilpatrick, 575 F.Supp. 325, 331-32 (D. Colo. 1983), *later op.*, 594 F.Supp. 1324 (D. Colo. 1984), *rev'd on other grounds*, 821 F.2d 1456 (10th Cir. 1987), *aff'd*, 487 U.S. 250 (1988).

Smith's attempt to speak here). In *Landmark Communications*, for example, this Court held that the state could constitutionally hold judicial review proceedings in secret and even restrict press access without running afoul of the Constitution. However, the same state statute imposing secrecy could not constitutionally prevent the media from disseminating the information obtained. *See also Florida Star v. B.J.F.*, 491 U.S. ___, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. District Court of Oklahoma*, 430 U.S. 308 (1977).

Even in access cases, when the defendant seeks access to transcripts of his own testimony, the courts have recognized a much diminished interest in secrecy. For example, in *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954), the court was confronted with the defendant's attempt to obtain access to transcripts of his own testimony. The court released those transcripts, noting that there was no possible impact on grand jury secrecy:

> Since all the defendant desires is a transcript of his *own* testimony, the sanctity of that which transpired before the Grand Jury is hardly in question. In addition, such disclosure would not subvert any of the reasons traditionally given for the inviola' 'ity of grand jury proceedings.

Id. at 630 (emphasis in original). No restraint on the publication or disclosure of this testimony was imposed by the court.

II. THE STATE HAS NOT DEMONSTRATED THE COMPELLING JUSTIFICATIONS NECESSARY TO RESTRAIN SMITH'S SPEECH.

There is no compelling need to impose a permanent and blanket gag on witnesses who appear before the grand jury. To justify the restraint, the State must show an interest of the highest order. *Smith*, 443 U.S. at 101-02. In other words, the State must prove an imminent and serious substantive evil, *Wood v. Georgia*, 370 U.S. 375, 385 (1962), and that the evil can be rectified by only the particular restraint at issue. *Florida Star*, 105 L.Ed.2d at 459.

In its attempt to prove an expansive need for secrecy, the State intones cases where this Court has discussed the historical reasons for grand jury secrecy. *See, e.g., Douglas Oil Co.*, 441 U.S. at 219, n.10. The State's arguments can be broken into two general categories: first, the State's fear that permitting witnesses to speak will interfere with the grand jury investigations; and second, the need to protect the innocent accused from reputational harm. Each justification is addressed in turn. As shown below, the State has not proven that total and permanent witness secrecy is necessary to accomplish either of these purposes.

A. The Permanent Restraint on Witness Speech is Unnecessary to Prevent Interference with the Grand Jury.

The State's argument that witness secrecy is necessary to prevent interference with the grand jury's investigation is based entirely upon speculation. The State's only witnesses on this point, State Attorney Joseph

D'Alessandro and Assistant State Attorney Warren Goodwin, did nothing more than parrot the justifications cited by this Court in *Douglas* without any attempt to identify any specific case where witness disclosure has ever affected a Florida grand jury's investigation. Nor did the State make any attempt to gather statistical evidence on any basis that would justify generalized claims of interference. The First Amendment requires far more than conclusory affidavits or vague speculation. *Wood*, 370 U.S. at 387-88 (the Court rejected the State's conclusory claims of injury in the absence of specific evidence of interference with grand jury's functions).

The State first argues that witness secrecy is necessary to protect the grand juror's identities. This public disclosure, the State hypothesizes, could interfere with the grand jury's investigations and deliberations by making the grand jurors a more likely target of retaliation.[12] The State overlooks the fact that the identity of grand jurors has long been public information in Florida. In the days when Florida was still a territory and in the early days of statehood, grand jurors were selected by lot from citizens summoned to the front of the courthouse steps.[13] Although the method of selection has changed over the

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[12] The State has not explained why grand jurors are more subject to retaliation than petit jurors who do not benefit from a witness gag order. The State also overlooks the fact that witnesses are not present during the grand jury's deliberations.

[13] § 7 Act of Nov. 15, 1829, compiled in Duval, Public Acts of the Legislative Council of the Territory of Florida (1839).

years, there has never been any statutory attempt to protect the identity of those selected to serve on grand juries.

In addition to being generally available to the public, the names of the grand jurors must be made known to the defendant. Florida Statutes give the defendant the right to challenge the makeup of the grand jury including the right to challenge particular grand jurors based on their identity. Fla. Stat. § 905.04 (1987). Florida defendants often exercised this right of challenge. *See e.g., Harman v. State*, 396 So.2d 222 (Fla. 4th DCA 1981) (identifying grand juror). In light of the fact that the identity of the grand jurors is already public and their deliberations remain secret, the State has not shown any justification, let alone a compelling one, for permanent witness secrecy to protect deliberations.

Next, the State speculates that witness secrecy is needed to prevent subornation of perjury or witness tampering. This justification, like the rest, is more theoretical than practical.[14] Potential problems with perjury or witness tampering exist in any judicial proceeding, not just in grand jury proceedings. Yet, this threat has never been deemed compelling enough to justify closure of any other pretrial or trial proceeding. Nor has the possibility of perjury been seen as a justification by Florida to gag witnesses interviewed by law enforcement officers rather than grand juries. State statutes preventing tampering of

[14] Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 461 (1965). Calkins' article contains an excellent discussion of the witness tampering problem. *Id.* at 460-65.

witnesses or penalizing perjury have been seen as adequate protection to forestall such threats.[15]

To persuade the Court that witness secrecy is necessary in this context, the State must argue that a witness who is willing to commit felony perjury would be prevented from perjuring himself by honoring a misdemeanor statute mandating witness secrecy. Obviously, any witness predisposed to perjury will speak to the defendant regardless of the existence of Section 905.27. All other honest witnesses should not lose their First Amendment rights as a result of a useless statutory prohibition. "The mere possibility that tampering could occur . . . is not the imminent type of threat to the grand jury proceedings that would justify restrictions on speech." Brown, *The Witness and Grand Jury Secrecy*, 11 Am. J. Crim. L. 169, 184 (1983).

Smith need not resort to speculation to support his argument that grand jury investigations will not be hampered if the restraint on witnesses is lifted. As proof, this Court need go no further than to examine the federal grand jury system. Each year thousands of federal indictments are presented without any statutory gag on witnesses.[16] Rule 6(e), Federal Rules of Criminal Procedure,

[15] *See* Fla. Stat., Ch. 837 (1987) (perjury); Fla. Stat., Ch. 838 (1987) (bribery); Fla. Stat. § 914.22 (1987) (witness tampering); Fla. Stat. § 918.12 (1987) (tampering with jurors).

[16] In each of the last three years, federal grand juries have returned in excess of 38,000 indictments. 1989 Annual Report of the Director of the Administrative Office of the United States Courts.

specifically excludes grand jury witnesses from those court personnel bound by any obligation of secrecy. Thus, Rule 6(e) "does not impose any obligation of secrecy on witnesses." Fed. R. Crim. P. 6(e) advisory committee's note. Effective in 1946, Rule 6(e)'s forty-three-year history is unequivocal proof, borne out by literally hundreds of thousands of federal indictments, that a grand jury can perform its functions successfully without any need to gag witnesses. As one commentator put it, "no empirical evidence" has suggested that permitting witnesses to speak in the federal system "has in any way interfered with the functions of the grand jury." Brown, *Witnesses and Grand Jury Secrecy*, 11 Am. J. Crim. L. 169, 181 (1983).

> There is no evidence that this breach of secrecy has diminished the effectiveness of the grand jury system or adversely affected the ability of the government to investigate crime and bring offenders to justice.

In re Russo, 53 F.R.D. 564, 570 (C.D. Ca. 1971).

The federal system has not acted in isolation. A survey of fifty-three states and territories reveals that at least thirty-seven of these jurisdictions have no restrictions on witness secrecy.[17] Thus, Florida is one of a minority of jurisdictions imposing any ban on the speech of witnesses who are called to testify in front of grand juries.

As well as proving that there is no good reason for secrecy, the federal and state experiences demonstrate that there is no "long tradition" of secrecy with regard to witnesses appearing before the grand jury. In the federal

[17] State statutes on grand jury secrecy are compiled in an Appendix to this brief.

system, for example, witnesses were free to speak in most federal jurisdictions even long before Rule 6(e) was enacted.[18] *See, e.g., United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254 (D. Md. 1931). State case law has recognized a witness's right to speak without fear of prosecution as early as 1854. *See Ashburn v. Georgia*, 15 Ga. 246 (Ga. 1854). Interestingly, even in Florida there is not a tradition of witness secrecy. A survey of Florida's grand jury statutes back to Florida's territorial days reveals the gag on grand jury witnesses was not adopted until 1951. 1951 Fla. Laws, Ch. 26584. The broad "content, gist, or import" language was not added until 1971. 1971 Fla. Laws, Ch. 71-66.[19]

The State's brief shrugs off the difference between the Florida and federal systems and thirty-seven of Florida's sister states and territories as a mere "policy choice." According to the State, this Court must defer to Florida's decision to gag its grand jury witnesses just as it must defer to the federal and state jurisdictions that have chosen otherwise. However, as this Court noted in a

[18] According to *In re Russo*, only 33 of 85 federal district courts required witness secrecy oaths prior to the enactment of Rule 6(e). *Id.* at 570.

[19] *See, e.g.*, Act of November 12, 1828 concerning the "summoning of Grand and Petit Jurors, and for other purposes" compiled in Duval, Public Acts of the Legislative Council of the Territory of Florida (1839) (containing no provision of secrecy). Unfortunately, no legislative history exists to document the reasons for the 1951 decision to impose secrecy upon grand jury witnesses, and none appears in the statutory language.

similar context, matters impacting on freedom of speech cannot be treated as policy decisions: "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications*, 435 U.S. at 845. Indeed, in *Landmark Communications*, this Court based its finding of unconstitutionality in part on the fact that more than forty other states with similar review commissions had not found it necessary to enforce confidentiality through the use of criminal sanctions. *Id.* at 841.[20]

Florida's own justice system is telling proof that witness restrictions are entirely unnecessary. Like many states, Florida can commence a prosecution by either indictment or information. However, in Florida, the vast majority of prosecutions – perhaps ninety-nine percent – begin by information.[21] The interests in secrecy are also

[20] Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (court must examine itself whether a clear and present danger exists). *See also* First Amendment Coalition v. Judicial Inquiry & Review Board, 784 F.2d 467 (3d Cir. 1986) (relying on Rule 6(e) as evidence that permitting grand jury witnesses to speak will have no disruptive impact on grand jury investigations); *In re Russo*, 53 F.R.D. at 570-71 (placing similar reliance on Rule 6(e)).

[21] Only capital crimes in Florida must proceed by indictment; the rest may proceed at the prosecutor's option by indictment or information. Fla. Const. Art. I § 15; Fla. R. Crim. P. 3.140. In Hillsborough County, for example, Chief Assistant State Attorney Chris Hoyer testified that only 50 to 100 of the 15,000 prosecutions brought in 1986 were initiated by indictment (R. 11 at 16-17).

present in these prosecutions. *Cf. Widener v. Croft*, 184 So.2d 444 (Fla. 4th DCA 1966), *cert. denied*, 192 So.2d 486 (1966) (equating prosecutorial investigations with grand jury investigations). Yet, these investigations, which constitute over ninety-nine percent of the prosecutions in Florida, are successfully conducted without any witness secrecy whatsoever (R. 18 at 19-20). Witnesses who speak to law enforcement officers, even if subpoenaed by investigative subpoenas, may immediately reveal anything they learned about the investigation.[22]

Having made the vast majority of investigations an open book, it is difficult for Florida to argue that it has a compelling need to restrain witnesses in the one percent of those cases that proceed by way of indictment rather than information.[23] Presumably, if the Florida Legislature had determined that investigative openness presented a serious potential for disrupting present or future investigations, the Florida Public Records Act would have long ago been amended.

[22] Florida has actually gone much further than merely to permit witnesses to reveal the substance of their conversations with investigators. Florida has enacted a comprehensive public records act that mandates that the *entire record* of the investigation be open to the public as soon as the investigation ceases to be active. Fla. Stat. § 119.07(3)d (1987) (exempting records of only active investigations from disclosure); Fla. Stat. § 119.011(3)(d)(2) (1987) (investigative records cease to be active once the decision is made not to prosecute).

[23] The State's argument is also undercut by the fact that the State has never found it necessary to prosecute anyone under Section 905.27.

B. There are Less Restrictive Alternatives to the Blanket and Permanent Restraint Imposed by Section 905.27.

Even if the State could convince this Court that Section 905.27 was critical to the investigative function of the grand jury, its task is not at an end. The Eleventh Circuit declared Section 905.27 unconstitutional only to the extent that it imposed witness secrecy after the close of the grand jury session. Thus, the State must convince this Court that the need for secrecy continues not only while the grand jury is in session, but forever.

The State's argument concerning the potential flight of the target of the investigation illustrates the absurdity of the perpetual restraint. A permanent and total ban on witness speech in all cases is hardly necessary to accomplish the State's purpose. Once the session is completed and the target is apprehended, the need for secrecy has ended.[24]

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[24] Moreover, the State's argument on this point is highly speculative. Few grand juries are conducted in such an atmosphere that the potential defendant does not even know if he is being investigated. Indeed, one of the State's witnesses noted that grand juries in Florida are reserved almost entirely for capital crimes or political prosecutions (R. 17 at 15). It would be the rare case where the target of a capital crime would not already know of that threat of prosecution. Similarly, in political cases, as the State's witness admitted, the target is usually well known to the community at the outset of the investigation. *Id.* Florida's grand jury statute confirms this reality by giving the defendant under investigation the right to challenge the make-up of the grand jury. Fla. Stat. §§ 905.02-905.04 (1987).

This Court has already recognized that the reasons traditionally advanced to justify nondisclosure of grand jury minutes do not apply once the grand jury's session ends. In *Dennis v. United States*, 384 U.S. 855 (1966), the defendant sought transcripts of his own testimony years after the grand jury was completed and after the defendant had already testified in public. This Court confirmed that the traditional reasons for grand jury secrecy did not apply after the close of the investigation. *Id.* at 872 n.18. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

Numerous lower federal courts have reached similar conclusions in cases concerning access to grand jury materials. Indeed, in the seminal case of *United States v. Rose*, the case that developed the rationale for grand jury secrecy later utilized by this Court in *Douglas* and *Proctor & Gamble*, the Court noted that the reasons for grand jury secrecy do not apply once the grand jury's work is completed. *United States v. Rose*, 215 F.2d at 629-30.[25]

Florida courts have reached the same conclusion. As early as 1936, the Supreme Court of Florida noted that the concerns for secrecy are largely eliminated once the grand jury session closes:

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[25] *See also* Palmentere v. Campbell, 205 F.Supp. 261, 266 (W.D. Mo. 1962); United States v. General Motors Corp., 252 F.Supp. 1071, 1072 (E.D. Mich. 1973); In re Petition for Disclosure of Evidence Before the October '59 Grand Jury of this Court, 184 F.Supp. 38, 40 (E.D. Va. 1960); United States v. Ben Grunstein & Sons Co., 137 F.Supp. 197 (D. N.J. 1955); Philadelphia Electric Company v. Anaconda American Brass Company, 41 F.R.D. 518, 519 (E.D. Pa. 1967).

> While it is the policy of the law to require the utmost secrecy as to a grand jury's proceedings while the grand jury is in session, the purpose and the policy of the law are largely accomplished after the indictment or presentment has been found and published, the custody of the indicted accused had, and the grand jury finally discharged.

Brown v. Dewell, 123 Fla. 785, 167 So. 687, 690 (Fla. 1936). *See State v. Drayton*, 226 So.2d 469 (Fla. 2d DCA 1969) (same).

The State's only response is to argue that on certain rare occasions the grand jury's investigations may carry over from one session to another. That there may be a need for secrecy in certain rare cases cannot justify permanent restraints in every case. Smith has never argued that the State did not have the power to seek an appropriate order from the Court in those cases where a compelling need can be shown. Reserving witness gag orders only for those cases where a compelling need is shown is exactly the response required by this Court when First Amendment freedoms are at stake.

C. Section 905.27 Does Not Protect the Innocent Accused.

The State's final justification has nothing to do with the process of grand jury investigations. Rather, it relates to the State's concern that witness disclosure may result in innocent individuals being falsely accused of crimes. This potential reputational injury is seen by the State as enough to support a blanket and permanent witness gag

in all cases, even in cases where the target is already known to the public.[26]

The State's interest in protecting reputational injury is not sufficient justification for a permanent prior restraint. In *Landmark Communications*, for example, the State argued that judges' reputations may be tarnished by the release of false accusations. This Court rejected the argument by commenting:

> Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason for repressing speech that would otherwise be free.

435 U.S. at 841-42.[27] *See Florida Star v. B.J.F.*, 491 U.S. ___, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (publication of name of rape victim could not constitutionally give rise to a civil action for invasion of privacy); *Oklahoma Publishing Co. v. District Court of Oklahoma*, 430 U.S. 308, 310-12 (1977) (protection of juvenile offender's reputation could not justify restraint on speech).

Moreover, this Court has rejected blanket First Amendment restraints even in cases where there is an acknowledged compelling interest. For example, in *Globe*

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[26] As discussed above, the target of the investigation is known in almost every case because Florida grand juries are used almost exclusively for capital crimes or in highly publicized investigations with political overtones. *See* note 24, *supra*. In such cases it is necessary to achieve the sort of public catharsis discussed by this Court in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). *See* testimony of prosecutor Goodwin (R. 17 at 15).

[27] As the State's own witness pointed out, most of the subjects of non-capital grand jury investigations in Florida are likely to be public officials. *See* note 24, *supra*.

Newspaper Co. v. Superior Court, 451 U.S. 596 (1982), this Court noted that there may often be a compelling interest in protecting the anonymity of a victim of a sexual assault. Yet, citing the important First Amendment interests at stake, the Court rejected an attempt to close all proceedings in every case concerning sexual assault. Such blanket closure was not the type of "sensitive tool" required when protecting First Amendment freedoms. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975).

Even if one could laud the State's motives, one must question its method. Section 905.27 causes more reputational harm to innocent participants than it protects. To accept the State's argument, one must presume that the identity of the "innocent target" is not yet publicly known.[28] In such a case, *every* person called before the grand jury will be viewed by the public as a potential target of the grand jury investigation. The act renders it impossible for any witness to clear his name, including the very target that the statute supposedly protects.

Suppose, for example, there were rumors that a target of a grand jury investigation was not indicted because he used his political influence. He could not defend himself for to do so would violate the statute. Moreover,

[28] Obviously, if an individual has already been publicly identified as being the target of the grand jury investigation (which will usually be the case), gagging the witness from revealing what is already publicly known would be a useless act. To survive First Amendment scrutiny, a restraint must not only be narrowly tailored, it must be shown to be of some use, i.e., it must be effective. *Florida Star*, 105 L.Ed.2d at 459-60; *Nebraska Press*, 427 U.S. at 567-68.

because of the content, gist, and import language in the statute, the target would risk criminal action if he spoke at all concerning the subject matter of his testimony. The result of all this is that Section 905.27 actually prevents the target from ameliorating the stigma of participating in a grand jury investigation.

Nor can the other witnesses called before the grand jury help the target salvage his reputation. The broad prohibition of Section 905.27 prevents the witness from declaring, "I told the grand jury he was innocent." In effect, the statute permits the State to silence the target's supporters.[29]

The damage to innocent grand jury witnesses who are not the targets of the investigation is even more severe. When grand jury proceedings are clouded by secrecy, every witness who appears before the grand jury may be considered the target of the investigation by his employer, friends, and associates. If false rumors appear to link the witness with the grand jury investigation, the witness cannot protect himself. Suppose the employer of a witness before the grand jury is concerned that her employee may be involved in illegal activity. The employee is helpless to defend his reputation. The employer may ask, "Are you being investigated by the

[29] Under similar circumstances, this Court recognized that a gag order may often have precisely the unintended effect of preventing the defendant or witnesses from squelching rumors which could be far more damaging to the target's reputation than the truth. *See Nebraska Press*, 427 U.S. at 567 (noting harmful effect of misinformation and rumors that may result from gag orders); *Florida Star*, 105 L.Ed.2d at 459-60 (restraint on speech ineffective because it cannot stop backyard gossip).

grand jury?" The employee's only legal response must be, "I cannot answer that question." No construction of Section 905.27, no matter how narrow, could permit any other answer because the employee could only know whether he was a target as a result of his appearance before the grand jury. The employer may ask, "What crime does the grand jury think you committed?" The employee cannot answer without criminal sanctions. If asked, "Is someone else the target of the grand jury investigation?" Again, the employee cannot answer. In all cases, the statute requires that the employee's answer be no answer at all. The government should not have the right to compel citizens to appear before the grand jury while taking away their right to comment upon why they were there.

Even assuming the State's worst case scenario, the innocent accused is not helpless in the face of this attack. The target has an equal opportunity to respond.[30] Moreover, to the extent the innocent accused believes he has been defamed by the witness, he has the right to bring a

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[30] This is not a case like United States v. Smith, 776 F.2d 1104 (3d Cir. 1985), where the Court expressed concern over the release of a bill of particulars identifying unindicted individuals as co-conspirators. Such an accusation has the stamp of official governmental action and the so-called co-conspirators have no judicial forum in which to clear their names. Their responses can be no more than unofficial denials to official action. Moreover, such unindicted co-conspirators almost certainly have no defamation cause of action against those who named them as co-conspirators. By contrast, there is no official imprimatur put on erroneous comments that may be made by grand jury witnesses. The victim's traditional tort remedies remain.

defamation cause of action which will give him a judicial forum to clear his name and to recover damages.[31]

The State's argument is also undercut by Florida's system of prosecuting by either information or indictment. Florida offers no secrecy protection to the innocent participant who is wrongly accused by a witness interviewed by the state attorney instead of the grand jury. These potentially innocent targets far outnumber those who may be misidentified as a result of grand jury investigations. Florida's dual system also renders Section 905.27 ineffective to protect reputational injury. *See The Tribune Co. v. Spicola*, 543 So.2d 757 (Fla. 2d DCA), *pet. rev. denied*, 547 So.2d 1210 (1989). *Spicola* concerned an application under Florida's Public Records Act by *The Tampa Tribune*, a daily newspaper. The *Spicola* decision confirmed that the information in a law enforcement investigative file was a public record and ordered its disclosure to *The Tampa Tribune*, despite the fact these investigative records were later utilized by the grand jury.

The *Spicola* case compellingly illustrates that in Florida it is extremely unlikely that any innocent accused will

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[31] The reputational injury feared by the State is little different from the type of publicity that often surrounds trials. All defendants or potential defendants, whether innocent or not, suffer the risk of being named, perhaps wrongly, as a participant in criminal conduct. Yet, the danger of erroneous publicity has never been seen by this Court as an adequate reason to impose a blanket gag order preventing any comment on a pending trial. Even when the defendant's Sixth Amendment right to a fair trial is at stake, it will only be the rarest of cases where the defendant will be able to justify a gag order. *Nebraska Press*, 427 U.S. at 558.

ever be able to keep his name secret because at the close of any investigation conducted by law enforcement or the state attorney, all investigative files are immediately accessible to the public. This disclosure takes place even if the matter eventually ends up before the grand jury. Thus, Florida's attempt to silence witnesses to protect the identity of the innocent accused is a useless gesture that has consequences that far outweigh its extremely limited utility.

The State has not justified the blanket and permanent restraint on speech imposed by Section 905.27. The Eleventh Circuit was correct to recognize the unconstitutionality of the State's attempt to silence its witnesses permanently. Its judgment should be affirmed.

CONCLUSION

For all the foregoing reasons, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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APPENDIX

I. *Fourteen [14] states expressly prohibit witness disclosure.*

Ariz. Rev. Stat. Ann. § 13-2812 (1984); Fla. Stat. § 905.27 (1987); Ind. Code § 35-34-2-10 (1986); Ky. Crim. Rule 5.24; La. Code Crim. Proc. Ann. art. 434 (West 1984); Mich. Comp. Laws Ann. § 28.959(6) (1984); Miss. Unif. Crim. Rule 2.04 (1972 & Supp. 1989); Mo. Rules Crim. Pro. 540.120 (1987); Nev. Rev. Stat. § 172.245 (1982); N.C. Gen. Stat. § 15A-623(e) (1984); S.D. Codified Laws Ann. 23A-5-16 (1979 & Supp. 1987); Tex. Code Crim. Pro. art. 20.15; Utah Code Ann. § 77-11-10 (1984); Wash. Rev. Code Ann. sec. 10.27.090(3) (1987).

II. *Two [2] states expressly prohibit witness disclosure until the accused is in custody.*

Ala. Code § 12-16, 211-215 (1984); N.D. Cent. Code § 29-10.1-25 (1989).

III. *Thirty-Seven [37] states and territories do not impose any apparent restriction on witness disclosure.*

Alaska Crim. R. 6(h); Ark. Stat. Ann. § 16-85-514 (1987); Cal. Penal Code § 924.2 (West, 1985); Colo. Rev. Stat. § 16-5-204(g) (1984); Conn. Gen. Stat. § 54-45(a) (1989); Del. Code Ann. tit. 11, § 1273 (1987); D.C. Court Rules Ann. 6(e) (1989); Ga. Code Ann. § 15-12-68 (1985); Rule 6(e), Hawaii Rules of Penal Procedure (1977); Idaho

Crim. Rules, Rule 6(e) (1987); Ill. Rev. Stat. Chapter 38, § 112-6 (Supp. 1989); Iowa Code § 813.2, Rule 3 (1986); Kan. Stat. Ann. § 22-3012 (1988); Me. Rev. Stat. Ann. tit. 15, § 1252 (1984); Md. Ann. Code § 8-213 (1984); Mass. Rules Crim. Pro. 5(d) (1984); Minn. Rules of Crim. Pro., Rule 18.08 (1979 & Supp. 1989); Mont. Code Ann. § 46-11-317 (1989); Neb. Rev. Stat. § § 29-1404-1415 (1985); N.H. Rev. Stat. Ann. § 600:3 (1985); N.J. Court Rule 3:6-7 (1988); N.M. Rules Crim. Pro. Rule 29.2; N.Y. Penal Law § 215.70 (McKinney 1986); Ohio Rules of Crim. Pro. Rule 6(e) (1988); Okla. Stat. tit. 21, § § 582, 583 (1984); Or. Rev. Stat. § 132.060 (1982); Penn. Rules Crim. Pro. Rules 255-257 (1989); Laws of Puerto Rico § 34:550 (1970 & Supp. 1988); R.I. Rules Crim. Pro. Rule 6(e) (1989); *Ex parte McCleod*, 252 S.E.2d 126, 128 (S.C. 1979); Tenn. Rules of Crim. Pro. Rule 6(k)(l) (1988); Rule 6(f), Vt. Rules of Crim. Pro. (1974); Va. Code Rule 3A:5(b) (1989); V.I. Code Ann. tit. 5, Sec. 6(e) (Supp. 1988); Rule 6(e)(2), W.Va. Rules Crim. Pro. (1989); Wisc. Stat. § 756.19 (1982); Wyo. Stat. § 7-5-203-204 (1982).
